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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Respondent's brief in opposition is devoted principally to reviling Greyhound. Obviously Respondent seeks to persuade this Court that Petitioners are evil and deserve what they got so that this Court should ignore the questions of law and policy presented and the improper means by which the result below was reached. While that formula has been successful until now,[1] all Respond-

1. The Court of Appeals, for example, relied heavily on the fact that the ICC had disapproved Petitioners' conduct (*e.g.*, Petition, App. A, pp. 9-11). Both lower courts seemed unconcerned about the obviously prejudicial effect of having the jury told that Petitioners entered into consent decrees prohibiting violation of the antitrust laws (Exs. 62, 265); that the ICC had disapproved Petitioners' conduct in issue (see Petition, p. 18, n.17); and that the United States had charged Petitioners with criminal contempt with respect to that conduct. (Tr. 1359-1363, 3268-3271, 3750-3755, 6322-6327, 6325-6652)

ent's vilification cannot obscure the truth, acknowledged by both courts below, that "this case is, in many ways, unusual, and that its complexity and difficulty set it apart from the common run of antitrust cases, if such a category in fact exists." (Petition, App. D, p. 38; App. A, pp. 29-30) For all its righteous zeal Respondent cannot deny that this case presents novel legal issues and important questions of policy that this Court should decide.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Granted to Correct the Court of Appeals' Serious Errors of Law in Refusing to Hold the Antitrust Laws Preempted.

A. THE JURY'S FINDING OF A VIOLATION OF SECTION 1 IS NO REASON TO DENY THE WRIT.

Respondent begins by accusing Petitioners of having "grossly misstated" the record, resulting in "an incredible distortion". That is said to have occurred because Petitioners described this as a "monopolization case" which was "essentially based on the approved acquisitions". (Resp. Br., p. 11) But that description is not Petitioners'; it is the Court of Appeals':

> "The *essence* of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood and thereafter deprived Mt. Hood of connecting or 'bridge' traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor." (Petition, App. A, p. 2)[2]
>
> "[Mt. Hood's] complaint alleged that . . . Greyhound had *restrained and monopolized commerce* . . . by means essentially the same as those that were the subject of the Commission's proceeding; that is, *the acquisition of independent bus lines with Commission consent . . . and thereafter engaging in the destructive competitive tactics* found by the Commission." (*Id.*, p. 5)

2. All emphasis is added unless otherwise stated.

That the approved and immunized transactions were central to Respondent's success before the jury cannot be doubted. (Petition, p. 20) Indeed, Respondent itself told the jury that "fundamentally" what it "charged Greyhound with here is monopolization." (Tr. 6174; *see* Tr. 6204, 6170-72) It is too late now for Respondent to try to change its theory.[3]

When stripped of its emotive language, Respondent's argument is simply this: There can be no preemption of the antitrust laws here because the jury found a violation of Section 1 of the Sherman Act. The idea apparently is that an agency's exclusive jurisdiction may preempt Section 2, but not Section 1 of the Sherman Act. (Resp. Br., pp. 12-13) That novel idea, however, is without any support and is repudiated by previous decisions of this Court which explicitly hold that exclusive agency jurisdiction preempts both Section 1 and Section 2 of the Sherman Act. *United States v. National Association of Securities Dealers*, 422 U.S. 694, 697, 730 (1975); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 661 (1975).[4] Far from being an "independent basis" for denying

3. Respondent states that the jury was told that improper use of monopoly power was required for a violation (Resp. Br., pp. 11-12), but ignores the indisputable fact that the jury was also erroneously instructed that such improper use could be shown from "wholly innocent or lawful acts". (Tr. 6759) Thus, admittedly immunized and lawful acquisitions coupled with "wholly innocent or lawful acts" become a violation of the Sherman Act. How can that be? Respondent does not answer that question and does not state why it is undeserving of this Court's attention. *See* Petition, p. 20.

4. Even Respondent's cases do not support its position. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973), was also a Section 1 conspiracy case. *See, e.g., Trans World Airlines, Inc. v. Hughes*, 214 F.Supp. 106, 108 (S.D.N.Y. 1963); 409 U.S. at 388. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), merely held that the particular conspiracy there involved was subject to the antitrust laws because the ICC had no power to regulate it. That the decision is so limited is made explicit by the third case on which Respondent relies, *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 306, n.11 (1963).

the Petition (Resp. Br., p. 13), Respondent's argument urges this Court to adopt a new and unprecedented rule of antitrust law, and thus in effect it presents yet one more reason for this Court to grant certiorari.

B. REVIEW BY THIS COURT IS NEEDED TO GIVE PROPER SCOPE TO THE ICC'S EXCLUSIVE JURISDICTION.

Contrary to Respondent's statement, Petitioners' request that this Court review the judgment below is not based solely on the fact that it is a pervasively regulated common carrier. (Resp. Br., p. 13)[5] Petitioners assert that review is critically needed because Congress intended the ICC to have exclusive jurisdiction to control the conduct here involved, and the decision below fails to give effect to that intention. (Petition, pp. 8-19)

First, Section 5(12) of the Interstate Commerce Act expressly declares the ICC's jurisdiction to be "exclusive and plenary". 49 U.S.C. § 5(12). (Petition, pp. 9-10) The Court of Appeals ignored that language. Now Respondent ignores it too. Action by this Court is needed to give that statutory mandate its proper effect.

Second, Congress expressly authorized the ICC to approve and immunize acquisitions, including anticompetitive acquisitions, and expressly empowered the ICC to control and regulate subsequent conduct, including anticompetitive conduct. 49 U.S.C. §§ 5(2), 5(10); *see also* 49 U.S.C. § 316. Congress also expected and intended that in exercising that authority the ICC would apply standards inconsistent with the antitrust laws. *McLean*

5. Pervasive regulation without more may provide antitrust immunity, and this case could present an opportunity for this Court to so determine, for it is indisputable that Petitioners' conduct was and is subject to pervasive ICC regulation. Respondent's argument that pervasive regulation does not provide antitrust immunity is at odds with statements in the opinions of this Court which have declined to find antitrust immunity because the industry there involved was *not* pervasively regulated. *See, e.g., Otter Tail Power Co. v. United States,* 410 U.S. 366, 373-74 (1973); *United States v. Radio Corp. of America,* 358 U.S. 334, 348-49 (1959).

Trucking Co. v. United States, 321 U.S. 67, 79-88 (1944); Petition, pp. 12-13, 19-20. Therefore, the ICC's jurisdiction at issue is exclusive and preempts the antitrust laws, quite apart from the express language of Section 5(12). (Petition, pp. 9-19)

Respondent asserts that implied immunity is not appropriate here because the ICC did not "approve" Greyhound's conduct. (Resp. Br., pp. 17-21) While the Court of Appeals accepted that rationale (Petition, App. A, p. 11), this Court has rejected it. (Petition, pp. 13-19)[6] Similarly, Respondent's (and the Court of Appeals') contention that immunity applies only if the precise conduct challenged by the antitrust complaint is necessary to make the regulatory scheme work (Resp. Br., pp. 18-21) misunderstands this Court's prior decisions, one of which has expressly rejected that reasoning.[7] Immunity is not implied because specific private conduct is necessary to the regulatory scheme, but because effective implementation of the regulatory scheme requires that the agency's *jurisdiction to regulate* that conduct be exclusive. Applying antitrust standards to conduct regulated by the ICC under Section 5 prevents the ICC from regulating conduct pursuant to the National Transportation Policy and inter-

6. *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363 (1973), did not involve conduct which had been approved by the CAB. Petition, pp. 13-15. *See also* 409 U.S. at 376-77. *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963), involved disapproved conduct. (Petition, pp. 15-16) So did *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659 (1975) (SEC adopted rule prohibiting exchanges from using or requiring members to use fixed commission rates with respect to nonmember rates. 422 U.S. at 675; *see also* 422 U.S. at 673-74). Respondent's quotation from *NASD* (Resp. Br., p. 18) is out of context; the SEC in fact had disapproved the challenged practices and had required corrective measures. *See* 422 U.S. at 733-34.

7. *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659 (1975): "To the extent that the Court of Appeals in [*Thill Securities Corp. v. New York Stock Exchange,* 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971)] viewed the question of implied repeal as a question of fact, concerning whether the particular rule [conduct] itself is necessary to make the Act work, we decline to follow that lead." 422 U.S. at 687; *see* Petition, p. 17 & n.15.

feres with its ability to determine the type, extent and timing of any needed remedies regardless of whether it has approved or disapproved the conduct involved. Moreover, the Petition explained how this case causes precisely these problems and how it has produced a specific conflict between antitrust and public interest standards. (Petition, pp. 16-19 & n.16) Respondent chooses to ignore these points; they remain valid and unanswered.

The fact that Respondent has misunderstood the principles embodied in this Court's prior decisions is unimportant. The fact that the Court of Appeals has similarly misunderstood them, however, is important. The Court of Appeals' misunderstanding has resulted in the erroneous imposition of a $14,400,000 judgment against Greyhound and in the promulgation of new and unsound principles which seriously undermine the ICC's ability to perform its statutory duties. (Petition, pp. 17-19)

C. REVIEW BY THIS COURT IS NEEDED TO GIVE EFFECT TO THE EXPRESS IMMUNITY PROVISIONS OF SECTION 5(12) OF THE INTERSTATE COMMERCE ACT.

Respondent admits that under Section 5(12) of the Interstate Commerce Act the "acquisitions remain immune from antitrust sanctions" (Resp. Br., p. 16), and it does not claim that the jury was told of the immunity. Therefore, Respondent effectively admits Petitioners' contention that the decision below is contrary to the express statutory immunity provided by Section 5(12). That alone is good ground for this Court to grant the Petition.

Instead of addressing Petitioners' arguments with respect to Section 5(12), Respondent chooses to attack a strawman of its own creation. Petitioners do not contend that Section 5(12) "immunize[s] every conceivable use of the acquired properties, no matter how collusive or predatory." (Resp. Br., p. 15) What Petitioners do contend is that ICC disapproval of *some* conduct does not mean that *everything* Petitioners did was not "necessary" within the meaning of Section 5(12). And it does not mean that

the acquisitions themselves, which no one contends were "disapproved", have somehow retroactively lost their statutory immunity. (Petition, p. 21) Yet the decision below creates precisely those illogical results. By approving the District Court's refusal to exclude evidence or to instruct the jury on the plain meaning of Section 5(12), the Court of Appeals has effectively read that Section out of existence. (Petition, pp. 20-21) Review by this Court is required if Congress' words and purpose are to have any meaning.

II. The Use of the Consent Decrees Sanctioned in This Case Presents Important Issues for This Court.

The Court of Appeals' decision approved the use of the consent decrees in this case on "the issues of motive, intent and purpose of Greyhound and the reasonableness of their behavior under Section 1 and 2 of the Sherman Act." (Tr. 6747) That decision destroys the incentive for defendants to settle government cases and therefore jeopardizes the Justice Department's consent decree program. That program is of "crucial importance"; it constitutes 80 percent of the Justice Department's antitrust enforcement efforts. (Petition, pp. 24-25) Respondent's brief effectively concedes the existence of the serious questions of public policy raised by the decision below. Those questions are plainly of major importance; the Court should grant certiorari to consider them.

All Respondent's brief does is to admit that Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), does not support the Court of Appeals' decision. (Resp. Br., p. 21) But it ignores the numerous cases which hold that decrees are not admissible absent Section 5(a). (Petition, pp. 22, 25)[8]

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8. The only known case in which a consent decree has been allowed in evidence for *any* purpose is *Vitagraph, Inc. v. Perelman,* 95 F.2d 142 (3d Cir.), *cert. denied,* 305 U.S. 610 (1938), a *non-jury* case in which a decree was admitted as evidence of a fact admitted in the decree. That is a far cry from the way Greyhound's consent decrees were used to influence the jury in this case. (*See* Petition, p. 22.)

In sum, the Court of Appeals' decision is both unprecedented and important. Respondent does not claim otherwise.

III. The Statute of Limitations Questions Are Important to the Administration of the Federal Courts and Antitrust Laws.

A. THE APPLICATION OF 15 U.S.C. § 16(i) TO THIS CASE PRESENTS AN ISSUE THAT SHOULD BE DECIDED BY THIS COURT.

The requirements of Section 16(i) are clear: The statute of limitations is tolled by a civil or criminal proceeding *instituted by the United States to prevent, restrain or punish violations of the antitrust laws* with respect to *matters complained of in the United States' proceeding.*

It is perfectly plain that those requirements are not satisfied by the ICC proceedings instituted by Mt. Hood to obtain a supplemental order under Section 5(10) of the Interstate Commerce Act in which the United States later intervened but complained of nothing and sought no relief. (Petition, pp. 26-29) It is also clear that the Court of Appeals' holding that the statute nevertheless was tolled is unique. Finally, it is clear that the Court of Appeals' decision is important to the future administration of the antitrust laws because it may well compel the lower courts to find the statute tolled in all the myriad circumstances of Justice Department participation in administrative proceedings. (Petition, p. 31)

Respondent does not deny that the Court of Appeals' interpretation of Section 16(i) is unprecedented; instead, it argues the merits of that interpretation. (Resp. Br., pp. 26-31) Its argument, however, does not dispute the need for this Court to grant certiorari to resolve the dispute concerning the Court of Appeals' novel construction of Section 16(i).

Respondent also contends that the holding below is unimportant, arguing that it will not apply to the Justice Department's participation in other agency proceedings. (Resp. Br., p. 31) But the Court of Appeals' decision contains no limitations. Moreover, Respondent's contention rests on its claim that in this case the

United States in fact "instituted" the ICC proceeding and thereafter "vigorously prosecuted" it. (Resp. Br., pp. 27-30) That claim is false. Respondent, not the United States, was the party seeking relief in the ICC proceedings, and the relief it sought was a modification of the prior ICC orders approving the acquisitions. The government's petition for leave to interevene did not charge Greyhound with any wrongdoing and, contrary to Respondent's statements (Resp. Br., pp. 27-28, 31), it did not ask for any relief. (Petition, pp. 27-29)

Respondent cites nothing to support a contrary conclusion. Its reference in this connection to the review proceedings before the three-judge court in Chicago *after* the ICC decision (Resp. Br., p. 28) is particularly misleading. The government was a party there only because the statute authorizing review of ICC orders required that review be sought by filing a complaint against the United States. 28 U.S.C. § 2322. And the fact that the Department of Justice performed its statutory duty to represent the ICC in proceedings to enforce an ICC decision, 28 U.S.C. § 2323, hardly shows that it "instituted" or "prosecuted" the ICC proceeding that resulted in the decision.[9]

More important, Respondent's arguments confirm that the decision below announces and depends upon a new and unwise rule of law. It announces a "functional equivalent" test (Petition, App. A, p. 24), thus making the applicability of Section 16(i) turn on what position the government in fact took in the administrative proceeding. Such an uncertain and confusing rule is both unnecessary and unsound. *Cf., Leh v. General Petroleum Corp.,* 382 U.S. 54, 65 (1965). Moreover that rule was not applied in this case, because there was no review of the administrative record to determine what the government did, said or contended.

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9. The review and enforcement proceedings no more establish that the United States instituted a proceeding against Greyhound than does a mandamus proceeding against a judge establish that the judge filed a complaint against the petitioner.

Finally, Respondent asserts an entirely new basis for finding the statute tolled. It argues that the statute of limitations should be suspended during its prosecution of the ICC proceedings by a doctrine of "equitable tolling" which it says would serve the policies of both the statute of limitations and the doctrine of primary jurisdiction. (Resp. Br., pp. 32-34) Although the Court of Appeals expressly declined to address this issue (Petition, App. A, p. 23, n.34), and although the theory seems plainly unsound, it is clear that adoption of such a novel and important doctrine would require that the Court grant certiorari to afford the matter full consideration.

B. THE FRAUDULENT CONCEALMENT ISSUE IS IMPORTANT TO PRIVATE ANTITRUST LITIGATION.

This Court has never considered whether or under what circumstances the four-year statute of limitations prescribed by 15 U.S.C. § 15b may be suspended by fraudulent concealment. Those are the questions this case presents, and Respondent's misstatement of the problem cannot change it. Greyhound does not ask this Court "to review the evidence again." (Resp. Br., p. 24) To the contrary, Greyhound asks this Court to address the serious question of law raised by the facts acknowledged by the Court of Appeals. (Petition, pp. 32-35)

The facts acknowledged by the Court of Appeals are that Mt. Hood had knowledge of and formally complained about the very practices it complained of in this action and that it suspected Greyhound of unlawful conduct. (Petition, p. 32) The question is whether the Court of Appeals properly held that that knowledge and suspicion were somehow erased and the known acts "concealed" because Greyhound denied them. That is the issue for this Court, if not in this case, then soon, because antitrust plaintiffs will not be slow to claim the bonanza the Court of Appeals' decision promises.

CONCLUSION

This is a hard case and it has made bad law. This Court will have to deal with that bad law, and the sooner it does the better. A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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